



C.M.A(MD)No.882 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on	07.11.2023
Pronounced on	21.12.2023

CORAM:

**THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN
and
THE HONOURABLE MR.JUSTICE P.B.BALAJI**

**C.M.A(MD)No.882 of 2022
and
C.M.P.(MD)No.13591 of 2023**

P.Chinnasamy

... Appellant / Petitioner

-VS-

P.Muthumalai

... Respondent / Respondent

PRAYER : Civil Miscellaneous Appeals have been filed under Section 19 of Family Courts Act against the Fair order and Decretal order dated 22.06.2022 made in H.M.O.P.No.132 of 2019 on the file of the Family Court, Srivilliputtur.

For Appellant : Mr.S.Alagarsamy

For Respondent : Mr.S.Venkatesh



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JUDGMENT

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(Judgment of the Court was made by RMT.TEEKAA RAMAN, J.)

This Civil Miscellaneous Appeal is directed against the Fair and Decretal order dated 22.06.2022 made in H.M.O.P.No.132 of 2019 on the file of the Family Court, Srivilliputtur

2. The unsuccessful husband is the appellant herein.

3. The appellant/husband filed H.M.O.P.No.132 of 2019 to dissolve the marriage between the parties under Section 13(1)(i-a) (i-b) of Hindu Marriage Act. After trial, the same was dismissed and hence, the present appeal.

4. The brief facts that are necessary for determination in this appeal are as under:

4.1. The appellant herein has initially filed H.M.O.P.No.21 of 1995 before the Sub Court, Srivilliputhur seeking divorce and the same was dismissed for default on 01.12.1998 and after a period of 21 years, the present H.M.O.P.No.132



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of 2019 is filed on 07.11.2019 before the Family Court, Virudhunagar at Srivilliputhur, under Section 13(1)(i-a) (i-b) of Hindu Marriage Act on the footing that during the pendency of the earlier H.M.O.P.No.21 of 1995, due to the intervention of the family elders and Village Panchayatar they arrived at a settlement between the husband and the wife and accordingly, the customary divorce was entered upon on 05.02.1998 and registered before the Sub Registrar Office, Vatharayiruppu and hence, the earlier H.M.O.P.No.21 of 1995 was dismissed for default and subsequently, on getting legal opinion, he has presented this H.M.O.P.No.132 of 2019 for dissolution of marriage on the ground of cruelty and desertion by the wife.

4.2. It is the further case of the appellant/husband that the customary divorce is prevalent in the community and customary divorce was reduced into writing as a divorce deed on 05.02.1998 wherein, permanent alimony was ordered and handed over to the wife, besides maintenance being paid to the minor son.

4.3. In the counter statement, the respondent/wife has denied the dissolution of marriage. However, she stated that due to the coercion and force exerted by the Panchayat President, she has signed the document and no amount



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has been paid as recited in the said document and further stated that even in the counter statement filed by her in H.M.O.P.No.21 of 1995, she has raised a plea that since the appellant/husband went to remarry another person at Chennai, where he is working, he has filed the present petition for divorce and further stated that even before dissolving the marriage subsisting with the respondent herein, the appellant/husband has again married one Sarala and reiterated that till date, the husband has not paid any amount as maintenance, either as stated by the alleged divorce deed or as ordered in MC.No.5 of 2013 and confirmed in Crl.O.P.(MD)No.13254 of 2018, dated 05.04.2019.

5. Before the trial Court, the husband examined himself as P.W.1 and marked Ex.P.1 and Ex.P.2. The wife examined herself as R.W.1 and marked Ex.R. 1 to Ex.R.3, namely, orders passed in earlier H.M.O.P.No.21 of 1995; order of interim maintenance passed in I.A.No.54 of 1995 in H.M.O.P.No.21 of 1995; and order and decree copy in I.A.No.54 of 1995 in H.M.O.P.No.21 of 1995.

6. On consideration of both oral and documentary evidence, the trial Court has held that the plea of customary divorce was not proved in the manner known to law and the alleged deed of divorce was not marked before the Court, none



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connected with the alleged customary divorce was examined by the appellant/husband and also commented that in order to avoid maintenance payable to the wife granted in I.A.No.54 of 1995, he has not proceeded to the said H.M.O.P.No.21 of 1995.

7. The learned counsel for the appellant would contend that on 05.02.1998, customary divorce has been effected and because of the said fact only, he has not prosecuted the earlier H.M.O.P.No.21 of 1995 and further contended that during the cross examination of R.W.1-wife, she had admitted the execution of the said document and also would state that her admission amounts to best piece of evidence and therefore, does not require any corroboration and contended that decree of divorce is to be granted.

8. The learned counsel for the respondent/wife would contend that if there had been any customary divorce as stated by the appellant it ought to have recorded in the earlier H.M.O.P.No.21 of 1995. Further, the earlier H.M.O.P.No. 21 of 1995 was dismissed for default and consequently, the present H.M.O.P.No. 132 of 2019 is not maintainable in law.



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9. Since the earlier H.M.O.P.No.21 of 1995 was dismissed for default and not on merits and hence, this Court has no hesitation to hold that the present H.M.O.P.No.132 of 2019 is maintainable and in respect of the divorce proceedings, there is no limitation so long as either of the party is alive, it is open to the aggrieved party to move the appropriate application for dissolution of marriage as stated, invoking any one of the grounds in the H.M.O.P or under the personal law with which the parties are governed by.

10. The major plea that was raised by the appellant/husband is the plea of customary divorce. On the plea of customary divorce in legal proceedings, the decision of this Court in ***W.P.(MD)No.17504 of 2014, dated 09.09.2020 [Sudalaimani Vs. The Deputy Inspector General of Police and another]***, is applicable, wherein, the relevant paragraphs are extracted hereunder:-

“...11.In the decision relied on by the learned Senior Counsel for the petitioner in 2005 (9) SCC 407 (Subramani and Ors. V. M.Chandralekha) it is held that,

“ the requirement to claim benefit of prevalence of customary right to divorce in a community must be specifically pleaded and established by the person propounding such custom and as per Hindu Law, divorce was not recognised as a means to



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put an end to marriage, which was always considered to be a sacrament, only exception being where it was recognized by custom”.

.....

13.In the second decision relied on by the learned Senior Counsel in **2002 (2) SCC 637 (Yamanaji H.Jadhav V. Nirmala)**, it has been held that,

“prevalence of customary divorce in community to which parties belong, contrary to general law of divorce must be specifically pleaded and established by person propounding such custom, otherwise no submission based on it can be entertained by the Court.”

14.On the combined reading of the above decisions, this Court finds that it is not disputed that as per Hindu Law, divorce was not recognized as a means to put an end to marriage which was always considered to be a sacrament with only exception where it is recognized by custom. After coming into force the Hindu Marriage Act, 1955 (for short "the Act") they can seek to put an end to their marriage by either obtaining a declaration that the marriage between them was a nullity on the grounds specified in Section II or to dissolve the marriage between them on any of the grounds mentioned in Section 13 of the Act. While, Section 29 of the Act saves the rights recognized by custom or conferred by special enactment to obtain the dissolution of marriage, whether solemnized before or after commencement of the Act. Section 29 (2) of the Act reads :



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"Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu Marriage, whether solemnized before or after commencement of this Act."

12. It is well established by long chain of authorities that prevalence of customary divorce in the community to which parties belong, contrary to general law of divorce must be specifically pleaded and established by the person propounding such custom. I had an occasion to deal with similar situation on plea of customary divorce in S.A.No.699 of 2002, dated 12.09.2019 (CDJ 2019 MHC 5656) the petitioner has to specific plead the existence of a custom in his community to dissolve the marriage by mutual consent or to prove the same by leading cogent evidence."

11. In the instant case, the husband has raised the plea of customary divorce which is said to have resulted in the divorce being reduced into a deed of divorce and the same has also been registered before the Vatharayiruppu Sub Registrar Office on 05.02.1998.

12. On a perusal of the list of documents filed before the Family Court either in this proceedings or in the previous proceedings, the alleged divorce deed was not produced for the reasons best known to the appellant. Admittedly, the



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marriage between the parties was solemnized as per their customs, in the presence of the kith and kin of both the parties on 16.02.1990. The marriage was consummated and they have been blessed with a male child born on 31.03.1991. The boy is now aged about 32 years and at the time of filing of H.M.O.P.No.132 of 2019, he was aged about 28 years.

13(a). The case of the appellant is that the wife has deserted the matrimonial home on 31.01.1992. Due to the desertion, he has filed H.M.O.P.No. 21 of 1995. During the pendency of H.M.O.P.No.21 of 1995, in the said case, customary divorce was alleged to have been effected on 05.02.1998. As stated supra, the alleged customary deed was not produced before the Court. On perusal of the records, we find that after completion of the trial and after the case was posted for argument, at the time, it appears that he has taken out an application for production of additional document. The same was returned and for the reasons best known, he has not prosecuted the I.A.No.54 of 1995. Consequently, no additional document has been filed. The Family Court has rightly commented upon the fact that the non-filing of the deed of customary divorce does not result in non-propablising of the alleged customary divorce. In the judicial pronouncement extracted supra, it is specifically stated that in order to



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substantiate the plea of customary divorce, it has to be specifically pleaded by the party that customary divorce is prevalent in the community and in that area and parties to the Panchayat also has to be pleaded and there must be an examination of the persons, who were present at the time of the customary divorce.

13(b). In the instant case, none of the above conditions as stated in the judicial pronouncements have been complied with by the appellant/husband. It remains to be stated that except the version of P.W.1-husband, no other persons were examined to substantiate that there was a panchayat that resulted in customary divorce. The deed of divorce was also not marked and therefore, the Family Court has rightly disbelieved the plea that was raised by the husband as customary divorce and hence, such a finding by the Family Court does not suffer from any irregularity or illegality warranting interference by this Court in the appellate stage.

14(a). Furthermore, it is an evidence that during the cross examination of P.W.1 that “எனது மகனுக்கு 3 வயதாகும் போது நான் வேறு திருமணம் செய்து கொண்டேன்” and the boy was born on 31.03.1991 and he could have been three years by 31.03.1994. The earlier H.M.O.P.No.21 of 1995 was filed in the year



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1995 and thus the trial Court has rightly inferred that on the date of filing of H.M.O.P.No.21 of 1995, the marriage between the parties was subsisting. However in the year 1994, while the boy was three years old, he has got remarried and hence, the trial Court has drawn inference that even before filing of the H.M.O.P.No.21 of 1995 and in the year 1995, the husband has married another girl by name Sarala, during the subsistence of marriage with the Muthumalai. Furthermore, even as per his own pleadings, the dissolution of marriage deed was entered on 05.02.1998 only and hence, by that time he has already married another lady by name Sarala.

14(b). At this juncture, it is relevant to state that in the earlier H.M.O.P.No. 21 of 1995, the wife has categorically stated that in order to facilitate the second marriage with another lady alone he has filed the divorce petition, assumes significance. Thus, the trial Court has rightly come to the conclusion that even during the subsistence of the marriage, the husband has contracted marriage with one Sarala and it is a specific pleading and evidence of R.W.1 that through Sarala, he has begotten a girl by name Mounika and she was studying Medical. The present application is filed after 21 years of alleged desertion by the wife. It is further to be stated that in the previous H.M.O.P.No.21 of 1995, the wife has filed



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I.A.No.54 of 1995 in H.M.O.P.No.21 of 1995, wherein, interim maintenance for the wife was ordered Rs.1,500/- each and litigation expenses of Rs.5,000/- each, under Section 24 of the Hindu Marriage Act. However, the appellant has not paid the amount and hence, we find that on the above factual background, the contention of the learned counsel for the respondent that in order to avoid the payment of the interim maintenance ordered in I.A.No.54 of 1995, the husband has failed to prosecute H.M.O.P.No.21 of 1995 appears to be most probable.

14(c). It is also seen from the records that M.C.No.5 of 2013 was filed by the wife for maintenance. By the time, the minor boy has become major and hence, maintenance was not awarded to him, however, maintenance of Rs. 10,000/- was awarded to the wife. As against which, he filed criminal revision in Cr.R.P.No.5 of 2015 and the same was dismissed on 28.04.2018. As against the same, the husband has filed CrI.O.P.(MD)No.13524 of 2018, wherein, this Court has categorically held that the dissolution of divorce by registration of document is not valid in law and the relationship of marriage between the parties is not severed by them. Consequently, this Court negated the plea of the husband that the wife was already divorced and further held that the relationship of husband and wife between the parties was in subsistence and existence and consequently,



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held that the husband is liable to pay maintenance to the wife and accordingly, dismissed the criminal original petition and thus, we find that the findings of the learned Chief Judicial Magistrate in M.C.No.5 of 2013, the marriage was not dissolved by the deed of dissolution of marriage, which was confirmed by this Court in CrI.O.P.(MD)No.13524 of 2018 also.

15(a). The plea of desertion has been urged by the learned counsel for the respondent. After perusing the counter statement filed by the parties, the trial Court has held that in view of the admission by the husband in his cross examination as P.W.1 that he got remarried in the year 1994 and at that time, his son was three years old and the alleged dissolution of marriage, though disbelieved by this Court is only in the year 1998 and therefore, till on the date of the marriage of the appellant with the second wife Sarala, the marriage with the present respondent is in subsistence and hence, the respondent/wife cannot live with the husband, when her husband has contracted marriage with another woman and living separately and hence, this cannot be deemed as desertion since she being in living separately with sufficient cause. Hence, the plea of desertion is also rightly rejected by the Family Court.



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15(b). It remains to be stated that a snap answer in the cross examination of R.W.1 that a document has been registered will not loom large and amount to admission of the contents of the document. R.W.1-wife has categorically stated that in her evidence that her signature was obtained in the document by the Panchayat President forcibly and by coercion and furthermore, the said document itself is declared to be void in various judicial proceedings by this Court. Any document alleged to be amounting to dissolution of marriage by mutual consent or any other grounds is held void by judicial pronouncement and hence, such an answer given by R.W.1 in the witness box will not loom large to the fact that as to admission of the dissolution of marriage. As stated supra, as the husband has come to the Court with specific plea of customary divorce, the burden is upon him to prove the same in accordance with law as stated in the above judicial decisions stated at Para No.10.

16. With regard to the finding that the appellant cannot take advantage of a snap answer as to the signature contained therein, since R.W.1 has categorically denied and disputed the contents of the document both in pleading and evidence, the burden does not shift away from the appellant. Accordingly, for the want of evidence, the trial Court has rightly rejected the plea of customary divorce and



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such a finding does not suffer from any illegality or irregularity and hence, all the points raised by the learned counsel for the appellant/husband stands negatived. Consequently, we find that there are no reasons to interfere with the well reasoned order passed by the learned Family Court Judge in rejecting the plea of dissolution of marriage.

17. In the result, this Civil Miscellaneous Appeal is devoid of merits and it is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

[T.K.R., J.] [P.B.B., J.]
21.12.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
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To

- 1.The Family Court, Srivilliputtur.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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RMT.TEEKAA RAMAN, J.
and
P.B.BALAJI, J.

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